Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-275

BAND-AGE, INC.,

Petitioner,

- against -

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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FOR THE FIRST CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the First Circuit entered April 13, 1976.

OPINION BELOW

The Opinion of the United States Court of Appeals for the First Circuit,

which is reprinted in Appendix E, is not yet officially reported. -P. A-45

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit, which is reprinted in Appendix D, was entered on April 13, 1976.

The time to file the Petition for Certiorari expired on July 12, 1976.

A Motion to extend Petitioner's time to file a Writ of Certiorari to the United States Court of Appeals for the First Circuit was made July 29, 1976; a letter dated August 3, 1976 from the Office of the Clerk of the Supreme Court of the United States regarding said motion is reprinted in Appendix F.

This Court has jurisdiction to review the judgment herein by Writ of Certiorari under 28 U.S.C. ¶1254(1).

QUESTIONS PRESENTED

1. Is Band-Age a successor to Paulis Silk, which would require that it recognize the Union as the exclusive bargaining agent of the employees?

2. Was sufficient evidence presented to establish the necessary criteria for a holding of successorship?

3. Did the Administrative Law Judge err in assuming, absent any evidence whatever, that a majority of the predecessor's employees were members of the Union who had been hired into the successor work force?

PETITIONER'S POSITION

1. Petitioner urges that the Administrative Law Judge failed to balance all of the circumstances to determine whether a finding of successorship was warranted, particularly when the evidence established that there was a basic change in the employee industry.

2. There was insufficient or no evidence to satisfy the criteria for successorship.

3. The failure to introduce evidence to show that a majority of the successor employees of Band-Age were union employees of the predecessor employer requires that the unfair labor practices recommended order be denied and the findings of the Administrative Law Judge be rejected.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as Amended, are as follows:

> §8(A)(1) It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7:

To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(A).

STATEMENT OF CASE

Hearing was held herein on August 14, 1974, before Administrative Law Judge Melvin J. Welles upon a complaint issued June 5, 1974, alleging that Petitioner violated §8(a)(1) and (5) of the Act. The complaint alleged that Petitioner engaged in unfair labor practices affecting commerce within the meaning of §8(a)(1) and (5) and §2(6) and (7) of the Act, in that Petitioner refused to recognize the Textile Workers Union of America, AFL-CIO, as the collective bargaining representative of the employees of Petitioner. The complaint alleged that Petitioner, as the successor to Paulis Silk Co., with whom a collective bargaining agreement existed with the union, was required to recognize the said

Union as the collective bargaining representative of employees of the former corporation. On September 30, 1974, the Administrative Law Judge rendered his decision, making findings of fact, conclusions of law and recommended order, holding Petitioner had engaged in unfair labor practices as charged in the complaint.

Petitioner filed exceptions to the proposed order, not only to the findings of fact as being contrary to the weight of credible evidence, contrary to the facts, and unsupported by any evidence whatever, but in addition to the application of the principles of law applicable to this case. Petitioner contends that the jurisdictional requirements were not fulfilled to vest the Board with jurisdiction of this matter.

THE FACTS

Paulis Silk Co. had been in

business for about thirty years, engaged in the manufacture of broadloom, textile materials, industrial tapes, narrow elastics, ace bandages and rubber elastic bandages.

For many years, Paulis' plant was located at 131 Clay Street, Central Falls, Rhode Island. At that location, Paulis Silk used and occupied approximately 80,000 square feet on all four floors of the building. In addition, Paulis Silk used and occupied space in other buildings, approximately 32,000 square feet.

Paulis Silk employed approximately 250-300 employees in the operation of its business. In 1972, approximately 150-170 employees were employed by Paulis Silk in about fifteen or twenty classifications. During 1973, when the corporation had announced the liquidation of its business and termination of its operations, approximately eighty employees were employed, and

in December 1973, when the corporation had ceased all manufacturing operations, liquidated or otherwise sold and disposed of its machinery and equipment, and had stopped manufacturing, about 24-25 employees were then employed.

In or about 1973, the Union negotiated a short-term contract with Paulis Silk, which expired December 31, 1973. The short-term contract provided for increased severance pay benefits and other benefits attendant upon Paulis Silk's public declaration that it was liquidating its plant, and terminating all business operations.

Petitioner, Band-Age, Inc., is a Rhode Island corporation which began its business operations on or about January 21, 1974.

The testimony at the hearing on August 14, 1974 established:

1. Paulis Silk had sold most of

its machinery and equipment and had liquidated its operations completely when Band-Age came into existence as an operational business corporation.

2. Band-Age did not start any business operations until after the Union contract with Paulis Silk had expired, after all of Paulis Silk's employees had been paid severance pay, and after Paulis Silk, as an ongoing business concern, ceased all operations.

3. Band-Age did not purchase any machinery, equipment, furniture, fixtures, good will, customers accounts, or other stock in trade of Paulis Silk other than a small amount of surplus raw materials.

4. Paulis Silk refused to give Band-Age a restrictive covenant not to compete.

5. Paulis Silk had moved the major portion of its machines and equipment

to Puerto Rico to establish a plant or factory, for the manufacture of the principal products formerly manufactured by Paulis Silk in Rhode Island.

6. Band-Age leased a small portion of the machinery and equipment left over and not utilized by Paulis Silk in the operation of the Puerto Rico plant, and purchased a small stock of raw materials from Paulis Silk.

7. Paulis Silk ceased all business operations on or about December 18, 1973. Band-Age commenced its business operations on or about January 21, 1974.

8. Paulis Silk and Band-Age were not engaged in the manufacture of the same products. Paulis Silk made five different products. Band-Age produced one product, a rubber elastic bandage different than that manufactured by Paulis Silk.

Paulis Silk used 250 different machines in 12-15 categories, while

Band-Age uses approximately 49-60 machines in five categories. Paulis Silk used and occupied 80,000 square feet in one building and approximately 32,000 additional square feet in other buildings. Band-Age occupies 25,000 square feet in one building.

9. Paulis Silk had approximately 15-20 union classifications. Band-Age has approximately seven or eight classifications. Paulis Silk had a number of customers and Becton, Dickson Co. was its largest customer, for whom the factory in Puerto Rico was established.

Band-Age and Paulis Silk had one customer in common, Surgicot, a very small customer who purchased small quantities of one item of its irregular production, i.e., "seconds".

Forty-eight of the broadloom machines owned by Paulis Silk were purchased for the construction, erection and outfit-

ting of a manufacturing plant in Puerto Rico, designed primarily for the manufacture of products previously sold to Becton, Dickson. The machines used by Paulis Silk to manufacture bandages were to be scrapped, until a lease with Band-Age for such work was made.

10. Paulis Silk sent supervisors, workers, office personnel and other employees to Puerto Rico for the establishment of its factory at that location. At least one of the supervisors remained in Puerto Rico for almost three years.

Band-Age advertised in the Pawtucket Times for employees, and former employees of Paulis Silk were told that if they were interested in employment, to watch for ads in the newspapers in the future.

11. Band-Age received approximately three hundred replies to its newspaper advertisement. Band-Age hired 35

employees who had previously been employees of Paulis Silk.

12. Band-Age did not hire any employees through the union and commenced an entirely new and different operation when it commenced its business operation in Rhode Island.

13. Band-Age expressly disavowed any liability or responsibility to the Union and refused to recognize the Union as the collective bargaining agent of the employees of Paulis Silk.

REASONS FOR GRANTING WRIT

The Court below applied a standard of review inconsistent with the intent of Congress.

If the order of the Court requires Petitioner to bargain with the Union, the Union would be bargaining for a group of employees who have not indicated in any recent activity that the majority

of whom desired union representation. Such an order clearly does not carry out the purpose of the National Labor Relations Act as amended.

In Tom A. Haisk Transit, Inc. v. N.L.R.B., 419 F.2d 1025, 1027, the Court stated:

> "If respondent's succession brought with it a change in the essential nature of the [employing] enterprise, then respondent had no duty to bargain."

The Court in William J. Burns International Detective Ag., Inc. v. N.L.R.B., 441 F.2d 911 (1971), stated:

> "The determination that an employer is a successor is made on the basis of 'continuity in the business operation' (N.L.R.B. v. Zayre Corp., 424 F.2d 1159, 1162 [5th Cir. 1970] that is, whether the operation is 'essentially the same as that previously conducted' (SS Kresge Co. v. N.L.R.B., 416 F.2d 1225, 1234 [6th Cir. 1969]. Has the 'employing industry retained its identity and continuity to a degree sufficient to make it reasonable that the successor employer be required to recognize the incumbent union [?]' Tom A. Haisk Transit, Inc. v. N.L.R.B., 419 F.2d at 1027."

Substantially all the important elements which the courts have found to deny successorship exists in the instant case.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

JD-642-74
Central Falls, R.I.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

BAND-AGE, INC.

and Case No. 1-CA-9767

TEXTILE WORKERS UNION OF
AMERICA, AFL-CIO

Thomas J. Flynn, Esq. of Boston, Mass.,
for the General Counsel.
Henry Schuman and Marcell Newfield, Esqs.,
of New York, N. Y., for the Respondent.
Francis P. McEntee, of Providence, R. I.,
for the Charging Party.

DECISION

Statement of the Case

MELVIN J. WELLES, Administrative Law Judge: This was heard at Providence, Rhode Island, on August 14, 1974, based on charges filed April 16, 1974, and a complaint issued June 5, 1974, alleging that Respondent violated Section 8(a)(1) and

(5) of the Act.

Upon the entire record in the case, including my observation of the witnesses and upon consideration of briefs, I make the following:

Findings of Fact

I. The Business of the Employer and the Labor Organization Involved

Respondent is, as it admits, a Rhode Island corporation, and an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act at its plant at 131 Clay Street, Central Falls, Rhode Island. At this plant, Respondent manufactures narrow elastic bandages. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. The Issue

The sole issue in this case is whether Respondent, Band-Age, Inc., was a "successor" to Paulis Silk Company. If it

was, then it was obligated to bargain with the Union, which had represented the employees of Paulis Silk, and it violates Section 8(a)(5) and (1) of the Act by refusing to do so.

B. The Facts

The operative facts are virtually undisputed, although some of the relationships between and among various companies involved in different transactions do not emerge too clearly from the evidence. Essentially, Paulis Silk was engaged, until December, 1973, in manufacturing plastic bandages of various sorts,[1] at its plant located at 131 Clay Street, Central Falls, Rhode Island. At one time, Paulis Silk also utilized some other space in unspecified other buildings; the record does not show when. Paulis Silk's principal

[1] Consisting of broadloom textile materials, industrial taped, narrow elastics, ace bandages, and rubber elastic bandages.

customers were Becton-Dickinson, and the United States Government. It also sold products to Surgicot, but only "seconds," and to two smaller customers. At its 131 Clay Street plant, Paulis Silk utilized about 80,000 square feet of floor space on all four floors. Some other companies, Harcourt, and York Finishing, also occupied space in that plant, and were apparently related to Paulis Silk, but, as noted above, the relationships do not clearly appear from the testimony. At its peak, some 8 to 10 years ago, Paulis Silk employed about 250 to 300 employees. By 1972, its employee complement was down to about 150 to 170 employees, in some 15 to 20 classifications. In 1973, it was down to approximately 80 employees, and, at the end of 1973, about 25 to 30 employees remained.[2]

[2] Again, the testimony is somewhat confusing. Plant Manager John Peacock testified that there were about 25 to 30 employees remaining at the end of

The Union, Textile Workers Union of America, AFL-CIO, which has represented employees of Paulis Silk for many years, in April, 1973 executed a new contract with the Company, with an expiration date of December 31, 1973. The reason for the short time of, and the increased severance pay provided in, the new contract, was Paulis Silk's representation to the Union it would be out of business by the end of the year. Paulis Silk ceased doing business as such on December 18, 1973. Prior thereto, Becton-Dickinson had purchased close to 50 of Paulis Silk's broadloom machines and taken them to Puerto Rico. In addition, a number of Paulis

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the year, but Controller Robert Greco testified that there "were 98 union employees" on Paulis Silk's final day of operations. I think Greco was confused, and find in accordance with Peacock's testimony, which comports with the other factors, such as the decline in the number of machines by that time because of the sale of many to Becton-Dickinson.

Silk's supervisors, office personnel, and employees had gone to Puerto Rico to help Becton-Dickinson establish a factory there.[3/]

Band-Age, Inc., began operations at 131 Clay Street on January 14, 1974. Prior thereto, Band-Age had arranged to lease the factory at that location from Paulis Silk,[4/] as well as about 50 of the Paulis Silk machines.

On January 2, 3, and 4, 1974, Band-Age advertised in the Pawtucket Times for employees. Out of approximately 300 replies to the ads, Band-Age hired about 35 employees, of whom all but two had been

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3/ Another company, Ace Bandage, was set up for this purpose. It is apparently an alter ego for Becton-Dickinson, but again the relationships were not clearly established by the testimony. They are not significant, in any event.

4/ The lease was actually from 131 Realty Co., apparently part of Paulis Silk, as the testimony generally was in terms of a lease between Paulis Silk and Band-Age.

Paulis Silk employees and were members of the Union. Some time early in October, Paulis Silk foreman Roland LaForge had told employee, and President of the Union, Rita McCabe that the operations would be continued. Late in November, Peacock was advised that he would remain with the new company[5/] as plant manager, and he supervised the moving of machinery to where the new company wanted it. Peacock also told employee Russel Levasseur that he could leave his personal belongings in his locker to await the reopening of the plant by Band-Age. On the last day of Paulis Silk's operations, Peacock advised the remaining employees to "watch the newspaper, and they

5/ At this point he had dealt with officials of Surgicot, but it was clear that his employment as plant manager would be with Band-Age. Although there is evidently some relationship between Surgicot and Bandage, other than that of the former being a customer of the latter, the testimony does not clarify this relationship.

were going to take applications for employment, and that anyone that was interested in coming back to work there would come and fill out an application."

As noted, John Peacock, who had been plant manager of Paulis Silk, did become plant manager of Band-Age. Paulis Silk supervisors Ray Fournier, Roger Tondreau, and Real Pare also became supervisors for Band-Age, and Frances Podolski, who had been "floorlady" for Paulis Silk, occupied the same position for Band-Age. Robert Grego, who was the conttoller for Paulis Silk, and represented Surgicot in the negotiations leading to Band-Age leasing the factory and equipment described above, became Administrative Manager of Band-Age, although he spends only about 50% of his time on Band-Age matters, as he also runs Harcourt.[6/]

6/ Harcourt has four employees, and is also located at 131 Clay Street. Two Band-Age employees sometimes do work

Plant Manager Peacock testified that "most of the employees I hired [at Band-Age] are doing the same jobs [as at Paulis Silk]." During 1972, when Paulis Silk had between 150 and 170 employees, there was about 15 to 20 categories of employees. The record does not show the number of classifications extant during 1973, or just prior to the Paulis Silk's closing. Band-Age, at material times, had about 7 or 8 classifications of employees.2/ Paulis Silk had used some 150 machines, whereas Band-Age used about 46 machines. The former number was obviously the figure either at Paulis Silk's peak employment, or at the latest in 1972, for many machines had long before the end of 1973 been sold to Becton-

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for Harcourt. They are paid by both companies.

2/ The General Counsel states this figure, in his brief, at 12. I believe he is mistaken, having taken this figure from the testimony of Peacock concerning the varieties of machines used by Band-Age.

Dickinson, and others had been scrapped.

On April 3, 1974, the Union requested Band-Age to recognize it as the exclusive bargaining representative for its employees, and Band-Age declined to recognize the Union. As indicated above, if Band-Age was a successor to Paulis Silk, Band-Age was obligated to recognize the Union.

C. Discussion

The General Counsel and Respondent are in agreement as to the principles of law applicable to this case. Each cites J.P. Mfg. Co., 194 NLRB 965, 968, where the Board adopted the Administrative Law Judge's formulation of the "questions asked" in determining successorship, as follows:

(1) Whether there has been a substantial continuity of the same business operations; (2) whether the new employees use the same plant; (3) whether he has the same or substantially the same work force;

(4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of productions; and (7) whether he manufactures the same product or offers the same services."

They part company, however, in the application of these principles to the facts of this case. In essence, the General Counsel claims that each criteria for finding successorship is satisfied by these facts, while the Respondent claims that none is.

The arguments advanced by each side as to several of the criteria, "use of the same plant," and "use of the same equipment . . .," where the facts are crystal clear, point up the nature of the disagreement as to all the criteria. Thus, the General Counsel asserts, correctly, that Band-Age used the same plant that Paulis Silk had used. And Respondent asserts,

also correctly, that Paulis Silk had used 80,000 square feet on all four floors of the plant at 131 Clay Street, while Band-Age uses only about 25,000 square feet and on only one floor and part of another, and that while Paulis Silk used some 32,000 additional square feet in other buildings, Band-Age does not.

The General Counsel correctly asserts that all of the machinery, some 46 machines, used by Band-Age were also used by (and are leased from) Paulis Silk. Respondent asserts, also correctly, that Paulis Silk had at one time over 200 machines, the majority of which were broadloom machines either sold to Becton-Dickinson or scrapped, and that Band-Age uses only about 50 machines that Paulis Silk had used, and all are "narrow loom" machines.

In short, the differences are quantitative, rather than qualitative, with respect to these two criteria. Band-Age

does use the same plant, but does not use all of it, but only about 35% of it. All of Band-Age's machinery had been used by Paulis Silk, but Band-Age uses only about 25% of the machinery that Paulis Silk had used. With respect to the other criteria, too, the differences between Band-Age and Paulis Silk are basically quantitative rather than qualitative. Thus, although virtually all the Band-Age employees were Paulis Silk employees, the employee complement at Band-Age, at pertinent times, was about 40, as against 250 to 300 employees at Paulis Silk 8 or 10 years earlier, 150 to 170 in 1972, and perhaps 80 to 100 at various times during 1973, with a complement of only about 25 at the end of 1973. Paulis Silk manufactured five "different products;" Band-Age manufactures only one. There were close to 20 classifications of employees in 1972 at Paulis Silk; there are only 7 or 8 at Band-Age. Only Surgicot, of

Band-Age's customers, was a customer of Paulis Silk, and Surgicot bought only "seconds" from Paulis Silk and was not a major customer. Only with respect to "supervision" are the two companies (contrary to Respondent's contention) substantially the same numerically, based on the record facts.

This case turns, in short, on whether a diminution in size, in virtually all respects, of the alleged successor from that of the predecessor, precludes a finding that the former is legally successor to the latter. Although there is language in Board decisions that seems to support such a conclusion,[8] other Board decisions specifically hold to the contrary.[9] Indeed,

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8/ E.g., the language in J.P. Mfg. Co., supra, cited by Respondent, that "On principle it would seem that Respondent is not using the 'same' machinery and equipment when, as here, it uses only a small portion thereof."

9/ E.g., Lloyd A. Fry Roofing Co., Inc., 176 NLRB 1026, f.n. 6, where the Board said "where as here nearly all, if not all, the employees in the continuing

in The Westgate Company, 194 NLRB 306, the Board found successorship even though the "successor" took over only one of two contracts formerly held by the predecessor. See also, Polytech, Inc., 186 NLRB 984.

In the instant case, any fair comparison between Band-Age and Paulis Silk must be with Paulis Silk at least during its final year in business, and certainly not with Paulis Silk at its employment peak 8 to 10 years earlier. Manifestly, Paulis Silk was not, in 1973, with perhaps a complement of about 80 employees, and much less at the end of that year, utilizing all the space and all the machinery that it had used earlier. Becton-Dickinson, before the

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operation were former National employees on the date of the demand, we find irrelevant the Respondent's objection that they nevertheless constituted only a small percentage of the number of employees formerly employed by National to do unit work." Subsequent Court and Board decisions involving this same case did not alter either the result or this language.

end of 1973, had purchased much of the broadloom machinery. So the comparison is between 70 to 100 machines at Paulis Silk, and 50 at Band-Age, and between the prorated use of space at Paulis Silk, as had to be the fact in 1973, as against the lesser amount of space used by Band-Age. The same considerations show that the number of classifications to be compared could not be 20 for Paulis Silk as against 7 or 8 for Band-Age, but the former figured had to be considerably less toward the end of 1973. Thus, even the quantitative differences are not so great as might at first blush appear. The hiatus of about 3 or 4 weeks between the closing of Paulis Silk and the opening of Band-Age is of little consequence. Cf. NLRB v. Foodway of El Paso, June 19, 1974, C.A. 5., where a closing of 3 weeks did not preclude a finding of successorship. The Foodway case is also instructive in that the Court rejected the company's argument

that 24 enumerated differences between it and its predecessor, demonstrated that it was not a "successor," as many of the factors enumerated are of the same type as the differences between Paulis Silk and Band-Age relied upon by Respondent here.

For all these reasons, I am convinced that the General Counsel has established by a preponderance of the evidence that Band-Age is a successor to Paulis Silk. As Band-Age admittedly did not recognize the Union, the finding of successorship requires a finding that Band-Age refused, in violation of Section 8(a)(5) and (1), to bargain with the Union, as well as the issuance of a bargaining order herein.

Conclusions of Law

1. All production and maintenance employees, excluding office clerical, laundry department employees, professional employees, guards, watchmen, and supervisors as defined in the Act, constitute a unit

appropriate for he purposes of collective bargaining with the meaning of Section 9(b) of the Act.

2. By refusing to recognize Textile Workers Union of America, AFL-CIO, as the collective-bargaining representative of the employees in the foregoing unit, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies or the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following

recommended: 10/

ORDER

Respondent, Band-Age, Inc., Central Falls, Rhode Island, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Textile Workers of America, AFL-CIO, as to wages, hours, and other terms and conditions of employment covering employees in the unit found appropriate herein.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

10/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with Textile Workers Union of America, AFL-CIO, as the exclusive bargaining representative of the employees in the unit found appropriate herein, and if an agreement is reached, embody such agreement in a signed contract.

(b) Post at its plant in Central Falls, Rhode Island, copies of the attached notice marked "Appendix."11/ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's

11/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(c) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C.

/s/ Melvin J. Welles
Melvin J. Welles
Administrative Law Judge

APPENDIX B

217 NLRB No. 71 D--9591
Central Falls, R.I.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAND-AGE, INC.

and Case 1--CA--9767

TEXTILE WORKERS UNION OF AMERICA, AFL--CIO

DECISION AND ORDER

On September 30, 1974, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Our dissenting colleague has catalogued certain facts and inferences which, standing alone, depict little or no continuity between Paulis Silk Company and Respondent. The Administrative Law Judge has presented, in his factual findings, a more complete description of the relationship between the two which adequately supports his and our conclusion that Respondent is the successor of Paulis Silk for the purpose of establishing its obligation to bargain with the Union when a majority of its employees consisted of former Paulis Silk employees.[1/]

1/ See United Maintenance & Manufacturing Co., Inc., 214 NLRB No. 31 (1974).

We limit our discussion of the facts to points raised by the dissenting opinion. The point is made that Respondent did not purchase fixed assets, machinery, fixtures, or furniture from Paulis Silk. As the dissent acknowledges, Respondent leased such items from Paulis Silk. We do not think the form of the business transaction under which the parties agreed to have Respondent take this equipment over is of great significance for purposes of determining the rights and obligations under the Act.

Although there was testimony that the narrow elastic bandage made by Respondent is not the same "type" that was produced by Paulis Silk, it is clear that it was similar enough so that it was made with the same machinery as a narrow elastic bandage Paulis Silk produced. Moreover, the operations are so similar that most of Respondent's employees are doing

the same jobs they did at Paulis Silk. We think, finally, that our dissenting colleague's statement, that the Paulis Silk workers had been terminated for approximately a month with little or no expectation of reemployment at the plant, ignores the Administrative Law Judge's findings that before Paulis Silk closed an employee who was the president of the Union was told that the operations would be continued, another employee was told Respondent would reopen the plant, and Paulis Silk employees were told on their last day that Respondent would be taking applications from "anyone that was interested in coming back to work there."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders

that Respondent, Band-Age, Inc., Central Falls, Rhode Island, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C.
APR 21 1975

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KENNEDY, dissenting:

Contrary to my colleagues, I do not agree with the Administrative Law Judge's finding that Respondent Band-Age, Inc., is a successor to Paulis Silk within the meaning of the Act and thus obligated to bargain with the Union which had previously represented the employees of Paulis Silk. The evidence clearly shows that no substantial continuity in the work force exists, and that Band-Age's operation resembles that of Paulis Silk only to the minor extent that it is engaged in the same

industry. I would dismiss the complaint in its entirety.

Paulis Silk was engaged in manufacturing broadloom textile materials, industrial tape, narrow elastics, ace bandages, and rubber elastic bandages at a plant located in Central Falls, Rhode Island. The main operation was spread over four floors, including the basement, using about 80,000 square feet of space. Paulis Silk also used about 32,000 square feet of space in another building. From a peak of about 250-300 employees, its employee complement gradually decreased to about 150-170 employees in 15-20 job classifications in 1972. In early 1973 it further decreased to 80 employees. At the time Paulis Silk went completely out of business on December 18, 1973, it employed only 25 to 30 employees.

At the height of its operation, Paulis Silk had about 150 machines in 12-15

categories including narrow and broad looms, weaving machines, warpers, quillers, and packaging machines. Paulis Silk had four or five customers, including Surgicot, a small customer which bought only "irregular" goods.

During the year 1973 Paulis Silk completely phased out its operations in Rhode Island and arranged to sell and transport about half of its machinery to another employer in Puerto Rico. Paulis Silk planned to scrap the balance of its machinery.

In the latter part of 1973 Surgicot[2/] hired Peacock, who had been plant manager for Paulis Silk, and Greco, who had been controller for Paulis Silk, as plant manager and administrative manager, respectively, for Respondent, which began its corporate existence in October 1973. In January 1974 Respondent entered into

2/ The record does not clarify the relationship between Surgicot and Respondent.

two lease agreements with Paulis Silk, one to lease about 20,000 square feet, i.e., "all of the first floor . . . and a portion of the basement," of the building used by Paulis Silk; and the other to lease office furniture and equipment and about 46-50 machines, including looms and quillers and three unspecified types for the production of one product, a narrow rubber elastic bandage.[3/] Respondent purchased only remnants of Paulis Silk's inventories and supplies, finished rubber elastic bandages, work in process, and raw materials related thereto. It did not purchase good will, customer accounts, fixed assets, machinery, fixtures, or furniture.

Respondent Band-Age began

3/ The narrow rubber elastic bandage produced by Respondent is not the same type of bandage which was produced by Paulis Silk. The latter made industrial tapes, a fabric for airplane wings, adhesive bandages, cohesive bandages, and fabric webbing for undergarments. Respondent does not make any of the latter products.

production on or about January 14, 1974, about 4 weeks after Paulis Silk had ceased production. On January 2, 3, and 4, 1974, Respondent advertised for workers in the Pawtucket Times newspaper and it received about 300 applicants. The record does not show the number of employees on its payroll at the start of operations, but at pertinent times Respondent had a complement of about 37-40 employees in 7-8 job classifications. Thirty-five were former Paulis Silk employees who at some time in the past had been members of the Union. There was a union-security clause in the contract between the Union and Paulis Silk which expired on December 31, 1973. Respondent also hired three former Paulis Silk supervisors, and as noted, supra, the former plant manager and controller. There is no evidence as to whether the 35 former employees of Paulis Silk continued their union membership beyond the expiration of Paulis

Silk's union-security and dues-checkoff clauses.

Respondent makes only a narrow rubber elastic bandage for its major customers, Surgicot, Eastern Scientific, and American Hospital, and "drop ships" its product to others unidentified on the record.

It is well settled that a change in ownership of a business enterprise does not, of itself, relieve the new owner from an obligation to recognize and bargain with the union that represented the predecessor's employees. N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272 (1972); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). As the Supreme Court stated in Wiley, "[t]he object of national labor policy, reflected in established principles of federal law, require that the rightful prerogatives of owners independently to arrange their

business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. . . ."[4/] The crucial test developed by the Board and sanctioned by the courts in determining whether a successor-employee inherits the labor obligations of the predecessor is whether the employing industry remained the same after the transfer. Consequently, the Board does not find successorship where all the circumstances demonstrate that there has been a substantial and material alteration in the employing enterprise. Lincoln Private Police, Inc., 189 NLRB 717 (1971).

It is my view that the circumstances present in this case cannot suffice under the legal tests set forth in the precedents, including J-P Mfg., Inc.,

4/ John Wiley & Sons, Inc. v. Livingston, supra, 549.

194 NLRB 965 (1972), on which the Administrative Law Judge relied, to establish successorship here. Respondent is not a successor because there is no substantial continuity of the same business operation. There is no dispute that Respondent uses less than one-fourth of the floor space, about one-third the number of machines, and about one-tenth the number of employees that the predecessor used at the peak of its operation. Furthermore Paulis Silk had completely ceased production and laid off its entire production work force almost 4 weeks before the Respondent began production on January 14, 1974. Since the Respondent did not start to hire employees until January 1974 this meant that the workers had been terminated for approximately 1 month with little or no expectation of reemployment at the Paulis Silk plant. While a majority of the employees subsequently hired by the Respondent were

former Paulis Silk employees, it cannot be said in these circumstances that there was a sudden change in their employment relationship brought about by the sale of the business to the Respondent. This hiatus in their employment is a significant, although not controlling, factor in determining whether there was continuity in the employing industry.

Also to be considered is whether the changes in the methods of the type of market supplied and the kind of products produced substantially altered the nature and character of the employing industry. These factors show changes in the type of product made, a change from supplying several products to supplying a single product to a different market except for one customer. Furthermore, there is not to be ignored the hiatus between the discontinuance of production by Paulis Silk and the commencement of production by the Respondent.

Accordingly, I find that there was no continuity of the employing enterprise. I further find that the nature and character of the employing industry at Respondent was sufficiently altered so that the Respondent could not be considered a successor-employer to Paulis. Gladding Corporation; Gladding-Paris Corporation, 192 NLRB 200 (1971). Cf. Galis Equipment Company, Inc., 194 NLRB 799 (1972).

In my view, Respondent was not obligated to bargain with the Union for the additional reason that there is no proof in this record that the employees hired by Respondent were union members at the time that Respondent hired them. Thus, although they had been members of the Union while employed some time by Paulis Silk, the record does not contain any evidence as to any employees' work history, e.g., when they were hired or laid off by Paulis Silk, or whether they were laid off sometime

prior to the time that Paulis Silk closed its operation in late 1973. There is no proof that the 35 employees who were hired by Rdspondent after it began operations in 1974 were employees on the Paulis Silk payroll and on dues checkoff in late 1973 when the latter ceased operations. They may have been employees who were laid off by Paulis Silk in 1972 or early in 1973 when it began to cut back on its operations and significantly reduce its employee complement.

Apart from the fact that Respondent's operations are a mere microcosm of those of Paulis Silk, Respondent employs only a small number of the number of employees Paulis Silk had in 1972 and 1973 before its final drastic cutback and phase-out of operations in December 1973. Plainly, there is no substantial continuity of identity in the work force when Respondent hires a small minority of the predecessor's

employees. In Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders, International Union, AFL-CIO, 417 U.S. 249 (1974), the Supreme Court held that there was a successor obligation in John Wiley & Sons, Inc. v. Livingston, supra, because of "the wholesale transfer of . . . employees" to Wiley.[5/] It is clear in this case that Respondent does not have "the same or substantially the same work force."[6/]

There is no evidence in this record to support a finding that the Union has been selected by a majority of Respondent's employees to represent them in bargaining. We do not know how many of them would want to have this Union represent them, nor do we know whether or not they

5/ See my dissenting opinion in United Maintenance & Manufacturing Co., Inc., 214 NLRB No. 31 (1974).

5/ Georgetown Stainless Mfg. Corp., 198 NLRB No. 41 (1972).

have continued to be union members.

In my opinion, no statutory policy is served by a bargaining order in this case since there is no basis for finding that the Union represented a majority of the employees after the change in ownership. My colleagues ignore the statutory policy banning recognition of a minority union. International Ladies' Garment Workers' Union, AFL-CIO v. N.L.R.B., 366 U.S. 731 (1961). It is not the prerogative of this Board to choose a union as bargaining representative for employees. The statute guarantees to employees the right to make the choice and it does not empower this Board to make the choice for them.

Based on the evidence in this case, I would find that there was not a substantial continuity of identity in the work force, nor in the business operations. Therefore, the complaint should be dismissed.

Dated, Washington, D.C.
APR 21 1975

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

Central Falls, R.I.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAND-AGE, INC.

and Case 1-CA-9767

TEXTILE WORKERS
UNION OF AMERICA,
AFL-CIO

ORDER DENYING MOTION

On April 21, 1975, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1/] in which it adopted the findings, conclusions, and recommendations of the Administrative Law Judge, as contained in his Decision of September 30, 1974, and ordered that the Respondent take the action set forth in the recommended Order of the Administrative Law Judge.

1/ 217 NLRB No. 71, Member Kennedy dissenting.

Thereafter, on May 19, 1975, the Respondent filed a Motion for Reargument, requesting the Board to reconsider its decision and requesting oral argument before the Board.

The Board having duly considered the matter, finds that the record, exceptions, and briefs adequate present the issues and positions of the parties. Therefore,

IT IS HEREBY ORDERED that the Respondent's request for oral argument be, and it hereby is, denied.

IT IS FURTHER ORDERED that the Respondent's Motion for Reargument be, and it hereby is, denied as it contains nothing not previously considered by the Board.2/

2/ Member Kennedy dissents from this part of the Board's order, and would grant the motion for reconsideration for the reasons set forth in his dissenting opinion.

Dated, Washington, D.C.,
June 23, 1975.

By direction of the Board:

George A. Leet

Associate Executive Secretary

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1355.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BAND-AGE, INC.,
Respondent.

DECREE

Entered April 13, 1976.

This cause came on to be heard on an application for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board is affirmed and

enforced.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[cc: Ms. McCaa and Mr. Schuman.]

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 75-1355

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

BAND-AGE, INC.,

RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Janet C. McCaa, Attorney, with whom *John S. Irving*, General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *John H. Ferguson*, Attorney, were on brief, for petitioner.

Henry Schuman for respondent.

April 13, 1976

McENTEE, *Circuit Judge*. This case is before us upon the application of the Board for enforcement of its order issued against Band-Age, Inc. ("Band-Age"). The Board found that Band-Age was a successor to Paulis Silk Company which until its demise had long had a collective bargaining agreement with the Textile Workers Union of America, AFL-CIO ("Union"). On the basis of this finding of successorship, the Board held Band-Age in violation of § 8(a)(5) and (1) of the National Labor Relations Act for refusing to recognize and bargain with the Union. The Board's order in pertinent part required Band-Age to recognize and bargain collectively with the Union as the

exclusive bargaining representative of its employees.[1]

There are few broad governing principles in the area of successorship. *NLRB* v. *Boston Needham Industrial Cleaning Co.*, 526 F.2d 74 (1st Cir. 1975). As the Supreme Court has recently noted, "in light of the difficulty of the successorship question . . . emphasis on the facts of each case as it arises is especially appropriate." *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, Hotel and Restaurant Employees Union*, 417 U.S. 249, 256 (1974). In the present case, the facts upon which the Board's finding of successorship is predicated are essentially undisputed. Until December 1973, the Paulis Silk Company was engaged in manufacturing elastic bandages at its Clay Street plant in Central Falls, Rhode Island.[2] The company sold its regular bandages to four customers. It also sold "seconds" to the Surgicot Company. Paulis Silk operated four departments within the plant: weaving, finishing, packaging, and shipping. In the 1960's Paulis Silk was at the peak of its production, using approximately 80,000 square feet of floor space and employing 250 to 300 workers in 15 to 20 job classifications, who operated 150 broadloom and narrowloom machines. The company produced five types of elastic bandages. The Textile Workers Union has represented Paulis Silk employees for many years, negotiating a number of successive collective bargaining agreements.

In the early 1970's Paulis Silk began to phase out its operations. In 1972 there were 150 to 170 employees, and during most of 1973 the plant operated with approximately 80 employees. In April 1973, the Union executed a collective

[1] *Band-Age, Inc. and Textile Workers Union of America, AFL-CIO*, 217 N.L.R.B. No. 71, 89 LRRM 1522 (1975).

[2] In addition to the manufacturing performed at its Clay Street plant Paulis Silk had utilized additional space in other nearby locations; however, the record does not indicate when this occurred, and it is not relevant to our disposition here.

bargaining agreement covering the remaining employees. This union-security contract was effective through December 31, 1973, and provided for a shortened term and increased severance pay based on Paulis Silk's representation that it would be out of business by the end of the calendar year. By the end of 1973 only 25 to 30 employees remained. During the latter part of that year Paulis Silk sold about 50 of its broadloom machines and supporting equipment to one of its customers, Becton-Dickinson, for use in a factory to be set up in Puerto Rico.[3] In late November 1973, Surgicot hired Paulis Silk's plant manager, John Peacock, and its controller, Robert Greco, to serve at the Clay Street facility as plant manager and administrative manager, respectively, for Band-Age which had been incorporated the previous month.[4] Thereafter Band-Age executed a lease with Paulis Silk, renting for a five-year term 20,000 square feet of floor space at the Clay Street plant, 46 narrow weaving machines, and various office machinery and equipment. Band-Age also purchased Paulis Silk's inventory, work in process, and raw materials. Peacock supervised the relocation of narrowloom machinery within the plant in preparation for Band-Age's operations. On December 18, 1973, when Paulis Silk ceased business operations, Peacock told all the remaining employees that they should "watch the newspaper" and that Band-Age was "going to take applications for employment, and that anyone that was interested in coming back to work there would come in and fill out an application." In the first week of January 1974, Band-Age advertised for employees in a local newspaper and started hiring.

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[3] A number of Paulis Silk's supervisors, office personel, and employees had also gone to Puerto Rico to assist in establishing Becton-Dickinson's factory there.

[4] Surgicot continues as the primary customer of Band-Age. The record does not further disclose the precise relationship between the two companies.

Band-Age hired all three of Paulis Silk's departmental supervisors, its only floorlady, and other of its employees. When Band-Age began operations on January 14 its work force consisted af 37 employees, 35 of whom had been Paulis Silk employees and members of the Union. Currently, Band-Age's employees work under 7 or 8 job classifications within the same four basic departments of weaving, finishing, packaging, and shipping as Paulis Silk had maintained. Band-Age produces a narrow elastic bandage[5] which it sells to Surgicot and several other customers. Plant manager Peacock testified that "[m]ost of the employees... are doing the same jobs [as at Paulis Silk]." On April 3, 1974, the Union sought recognition from Band-Age as the exclusive bargaining representative for its employees. Band-Age declined to recognize the Union, thus precipitating this action.

The central question in a successorship case is whether there has been "a change of ownership not affecting the essential nature of the enterprise," *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1026-27 (7th Cir. 1969); *see NLRB* v. *DIT-MCO, Inc.*, 428 F.2d 775, 780 (8th Cir. 1970); if no essential change is found "the successor employer must recognize the incumbent union and deal with it as the bargaining representative." *Tom-A-Hawk Transit, Inc.* v. *NLRB, supra* at 1027. In deciding this issue the Board must examine the "totality of the circumstances." *NLRB* v. *Boston Needham Industrial Cleaning Co., supra* at 77. Our inquiry in this case is guided by the latest Supreme Court case involving a new employer's duty to bargain, *NLRB* v. *Burns International Security Services*, 406 U.S. 272 (1972). In concluding there that "where the bargaining unit remains unchanged and a majority of employees hired

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[5] The bandage is similar to, but not identical with a narrow bandage formerly produced by Paulis Silk.

by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union," 406 U.S. at 281, the Supreme Court has identified two factors of basic importance: (1) the continued appropriateness of the bargaining unit; and (2) the permissibility of assuming the continued existence of a union majority.

We have little doubt that here the bargaining unit remained appropriate. Although the business had shrunk, the nature of the work was still the same; the same machines (albeit fewer) were used; the same plant (although less space) was worked in; the same type of product (although not the identical bandage, and not several types) was made; the same supervisors were in charge; and while there were fewer employees, most did the same work as previously, and all but two of the employees had worked for the predecessor employer. These indicia, as we read them, point to the continued existence of the unit, and indeed, a continued enterprise rather than a new one. The operations had shrunk, but the nature of the employment remained essentially the same.

The more difficult question, and one to which the shrinking of operations remains relevant even though the unit has been found appropriate, is whether a presumption of continued union majority status was warranted. Quantitatively, *Burns* instructs us to consider the percentage of the successor's employees who have been union members working for the former employer.[6] In *Burns*, the rehiring

[6] While *Burns* is not unambiguous on this point, permitting a reading that the relevant percentage is the number of carryover employees compared to the size of the predecessor's workforce, we agree with *Boeing Co.* v. *International Ass'n of Machinists*, 504 F.2d 307 (5th Cir. 1974), that in a duty-to-bargain context the percentage should be of the successor's workforce. The reference is explicable because in *Burns* the predecessor employer and the successor employer both employed the same number. *See also* Note, 88 Harv. L. Rev. 759 at 771 n. 76.

of 27 former employees along with 15 new ones was enough for the Court to approve the NLRB's drawing an inference of continued union majority despite the possibility that only 7 of the successor workforce had originally voted for the union.[7] Here the mathematical inference is considerably stronger for 35 of the 37 Band-Age employees had previously been employed by Paulis Silk and were union members there.

The inference is weaker in one respect. In *Burns*, the election was only several months prior to the succession, and the Court may have had in mind the almost conclusive presumption of a continued union majority for one year following Board certification. Here, by contrast, the union had been with the plant for many years, the union security clause required every worker to join, and recognition had been attained, apparently, when Paulis Silk's employees numbered in the hundreds. Theoretically, all of the 35 employees hired by Band-Age could be unwilling to vote for the union today. The purely statistical probabilities, of course, are against that proposition;[8] but the fact of union membership here does not imply as strongly an attachment for the union. This difference, however, does not warrant the opposite inference; and absent a change of employers the presumption of continued majority support would unquestionably be appropriate, rebuttable only upon the employer's showing of a good faith doubt. The real question here is why, apart from the differences in the enterprise which a particular succession may have produced (which, as we have noted, were not fundamental

[7] *See* 88 Harv. L. Rev. at 772, n. 81.

[8] Given random selection, the smaller group will be representative of the larger. To select for antiunion sentiments, of course, would be a violation of § 8(a)(3).

in this case), the mere presence of a new employer should change this settled principle.

We see no persuasive reason to vary the law which would prevail in the absence of a change of ownership. A successorship situation requires sensitivity to the interests of both the entrepreneur and the employees. The task of determining the appropriateness of the bargaining unit should give full consideration to the differences in operations contemplated by the employer. But, if it can be said that the employer is reaping the advantages of continuity, the employees' interest in some stability of representation during a period of volatility takes on added significance. *See generally* Morris & Gaus, *Successorship of the Collective Bargaining Agreement: Accommodating Wiley and Burns,* 59 Va. L. Rev. 1359 (1973). While there is no recent evidence of the employees' continuing support of the union, there has been no attempt by the employer to demonstrate a good-faith doubt about that support. The narrow issue here, then, is: in the absence of positive evidence of continued support of the union, as demonstrated by a recent election or other proof of current attitudes, should the Board indulge a presumption of continuity or discontinuity of allegiance? Were the latter to be the law, we confess some difficulty in line drawing. How long ago must the choice of the bargaining agent have been made to be deemed of no consequence? Should it make a difference how the bargaining agent was chosen? Should the amount of turnover in the labor force make a difference? We would be reluctant either to adopt arbitrary time limits or to engage in a complex factor-weighing exercise. At least in this case, where 94 percent of the successor's employees came from the predecessor's all-union workforce, we think that the Board could reasonably conclude, in the absence of direct evidence, that union support continued. Further,

the diminution of the enterprise did not represent changes so substantial from a labor-relations perspective as to compel the rejection of the presumption of a continued majority. *See generally Zim's Foodliner, Inc.* v. *NLRB,* 495 F.2d 1131 (7th Cir. 1974).

Band-Age also contends that although the union had been the recognized representative of the Paulis Silk employees, this fact is no indication that they, after discharge (with severence pay) necessarily maintained union ties or continued union membership. While discharge and severence pay obviously signal the end of employment, they may have little bearing on continued reliance on a union for representation. Offsetting the specific factors of formal discharge and severance pay in this case are the facts that the employees were told to watch the papers, encouraged to sign up, and that one employee was even allowed to keep his things in his locker in the interim. Band-Age places great stress on the four-week hiatus between Paulis Silk's closing in mid-December, and Band-Age's opening the following January. While the Board has sometimes relied on a substantial hiatus between the termination of the predecessor's operations and the commencement of the new employer's operations in finding no successor obligation to bargain, it has done so only where the hiatus in operations is "one of many factors pointing to such a substantial transformation in the nature of the predecessor's operations that a real question was presented, by the combination of circumstances, as to the employees' desires with regard to representation". *United Maintenance & Manufacturing Co., Inc.,* 214 N.L.R.B. No. 31, 87 LRRM 1469, 1472 (1974). However, the factual circumstances of the present case appear to afford no such basis for questioning the employees' desires as to representation by the Union. *See NLRB* v. *Daneker Clock Co.,* 516 F.2d 315 (4th Cir. 1975)

(per curiam); *see also C. G. Conn, Ltd.*, 197 N.L.R.B. 442, 445-46, 80 LRRM 1387, 1388-89 (1972) *enforced*, 474 F.2d 1344 (5th Cir. 1973) (mem.).

Band-Age also contends that a successorship finding is unwarranted because it did not purchase substantial assets or goodwill from Paulis Silk and did not obtain a covenant not to compete. However, we do not find substantial merit to this claim for several reasons. First, Band-Age leased floor space, machinery, fixtures, furniture and equipment from Paulis Silk. The fact that the transfer took the form of a lease rather than an outright sale is not of great significance for purposes of determining the rights and obligations under the Act. *See Tom-A-Hawk Transit, Inc.* v. *NLRB, supra* at 1027. Further the finding of successorship has been upheld even where the transfer of the enterprise involved assignment "of leasehold interests in the ... buildings," and where the purchaser "did not agree to buy ... good will or other intangibles, and did not generally assume ... liabilities." *Zim's Foodliner, Inc.* v. *NLRB, supra* at 1133-34.

Band-Age further contends that it ought not to be held a successor because the scope of its operations was far smaller than that of its predecessor in both the size of its workforce [9] and the number of its products. While change in the size and scope of operations of the new employer is a relevant consideration, *see International Ass'n of Machinists, District Lodge 94, AFL-CIO* v. *NLRB*, 414 F.2d 1135 (D.C. Cir.), *cert. denied*, 396 U.S. 889 (1969); *J. P. Mfg. Co.*, 194 N.L.R.B. 965, 79 LRRM 1216 (1972), nevertheless diminution in size does not necessarily preclude

[9] While Paulis Silk at its peak had 250 to 300 employees, this number had diminished substantially by 1972, and during 1973 was approximately 80 to 100, with a complement of only about 25 at the end of 1973. It would appear that, as the Administrative Law Judge noted in his opinion, "any fair comparison between Band-Age and Paulis Silk must be with Paulis Silk at least during its final year in business and ... not ... at its employment peak 8 to 10 years ealier."

a finding of successorship. *See NLRB* v. *Boston Needham Industrial Cleaning Co., supra* at 77; *see also NLRB* v. *Armato*, 199 F.2d 800, 803 (7th Cir. 1952). After examining the factual circumstances of this case the Board found that the differences between Paulis Silk and Band-Age were not sufficient for the latter to avoid the successor obligation. As we noted earlier, the Board found[10] that although Band-Age uses only a portion of Paulis Silk's machinery (a substaintial portion of which had been transferred to Becton-Dickinson in Puerto Rico), virtually all of Band-Age's machinery is from Paulis Silk; and that although the narrow elastic bandage made by Band-Age is not exactly the same as that previously produced by Paulis Silk, it is similar enough to be made with the same machinery. Moreover, the Board noted that Band-Age's operations were so similar to those of its predecessor that most of its employees were doing the same jobs they had performed previously. On such a record the Board could properly find that whatever changes had occurred would not significantly affect employee attitudes. *NLRB* v. *Boston Needham Industrial Cleaning Co., supra* at 77; *see Zim's Foodliner, Inc.* v. *NLRB, supra.* In sum, our review of the factual circumstances of this case indicates that the Board's finding of successorship was suported by substantial evidence and its administrative determination must be sustained.

The petition of the Board for enforcement of its order is granted.

[10] The Board, after considering the record, affirmed the findings and conclusions of the Administrative Law Judge, and we therefore treat the latter's findings of fact as those of the Board.

CAMPBELL, *Circuit Judge* (dissenting). My views are generally similar to those of the dissenting member of the Board and of Judge Pell who dissented in *Zim's Foodliner, Inc.* v. *NLRB,* 495 F.2d 1131, 1144 (7th Cir. 1975). The court in *Zim's* held in a comprehensive opinion that the purchasers of several markets from a nationwide supermarket chain had a duty to bargain with former employee representatives. Judge Pell took the view, however, that changes in size and operational methods of the new employers made it unreasonable to presume that the old union still represented a majority of employees within the greatly diminished bargaining units.

Here, Band-Age employs only about one-seventh the workforce and about one-third of the floorspace that Paulis Silk employed when the latter was at full capacity. Band-Age has fewer than one-half of Paulis Silk's job classifications, produces a single product, and sells to a markedly different and more restricted clientele. Moreover, unlike the situation that obtained in *NLRB* v. *Burns Security Services,* 406 U.S. 272 (1971), the Paulis Silk employees did not elect the Union on the eve of the change in employers. Rather the Union's status as bargaining agent dates back (as Judge Pell wrote in *Zim's, supra*) to "ancient history". Selection of the Union occurred many years ago at a time when Paulis Silk was presumably operating with its full complement of 250 or 300 employees. How many, if any, of the Band-Age employees who once worked for Paulis Silk ever actually voted for the Union is unknown. Indeed, it is not known that an election was ever held. And the last contract negotiated between Paulis Silk and the Union was written to terminate in December, 1973, and provided for severance pay, reflecting the expectation that Paulis Silk would cease operations in December, 1973, thus ending that chapter of industrial relations.

Under these circumstances, I find it too speculative to adopt as a "presumption" that when Band-Age commenced operations nearly a month after Paulis Silk ceased, a majority of its employees desired or even anticipated representation by the Union. To be sure, nearly all of them had worked at Paulis Silk and had been members of the Union as required by the collective bargaining agreement. But given a new employer, a different business, and a more intimate unit, it is perfectly possible that the employees had no desire to reestablish the Union in its former role.

The premise of the National Labor Relations Act is industrial democracy, requiring an employer to bargain with the representative of a majority of its employees. This democratic principle must, of course, yield to practicality and the need for industrial peace, as rules limiting the frequency of elections illustrate. *See e.g., Brooks* v. *NLRB,* 348 U.S. 96 (1954). But such rules, presuming the continuity of majority sentiment, evolved within the frame of a single enterprise. While they may be appropriately extended to genuine successor entities, they should not apply where the original bargaining unit and nature of the enterprise have been radically altered. I fear that the enlargement of the successorship doctrine to accommodate such a case may sweep aside the the requirement that the Union have roots in the actual wishes of the employees. *Cf. International Ladies' Garment Workers' Union, AFL-CIO* v. *NLRB,* 366 U.S. 731 (1961). Here it would be simple to require an expression of the wishes of the 37 current employees rather than to presume, somewhat woodenly, that the earlier-expressed wishes of a different group of employees working for a different employer remain effective.

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APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 3, 1976

Henry Schuman, Esquire
1775 Broadway
New York, New York 10019

Dear Mr. Schuman:

I am returning your application for extension of time to you. This Court cannot grant an extension of time once the time for filing has expired.

If you still desire to file a petition for writ of certiorari or to docket an appeal, you may do so and your petition or appeal will be docketed and sent to Court with a notation as to its untimeliness.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Peter K Beck

Peter K. Beck,
Assistant Clerk

vc
Enclosure

Supreme Court, U. S.
FILED
OCT 14 1976
MICHAEL RODAK, JR., CLERK

No. 76-275

In the Supreme Court of the United States

OCTOBER TERM, 1976

BAND-AGE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

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The petition for a writ of certiorari in the instant case, filed on August 24, 1976, is untimely. The judgment of the court of appeals in this civil matter (Pet. App. A-43—A-44) was entered on April 13, 1976. The time for filing a petition for a writ of certiorari was not extended[1] and, accordingly, the 90-day period provided in 28 U.S.C. 2101 (c) for petitioning in civil cases expired on July 12, 1976.

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[1]Petitioner filed an untimely application for an extension of time (Pet. App. A-57), which was returned by the Clerk of this Court.

The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418. Accordingly, the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

OCTOBER 1976.